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Hugo Weenen

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EXAMINER

MOORE, WALTER A

ART UNIT

PAPER NUMBER

1789

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DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/587,095	Applicant(s) WEENEN ET AL.	
	Examiner WALTER MOORE	Art Unit 1789	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>12262006</u> | 6) <input type="checkbox"/> Other: ____ |

DETAILED ACTION

Information Disclosure Statement

1. The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609.04(a) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered. The specification refers to various NPL documents and patent documents. However, these documents were not listed on an IDS. The specification concludes with a list of references. Applicant did not list the references on an IDS. Applicant did not provide a copy of the references. Unless cited by the examiner, the references have not been considered.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 1-19 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1-19 are indefinite because the meaning of improving the sensory rating is unclear. Of having ordinary skill in the art could not determine the metes and bounds

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of ratings included or exclude from the phrase. The specification defines "Sensory rating" or "sensory perception" is used herein to refer to a subject's rating of one or more sensory attributes of a food product" (specification, p. 3, ln. 17-18). Therefore a sensory rating is a subjects rating of an attribute. The meaning of attribute is not limited.

The term "improved" in claims 1, 11, 13, 14, and 15, is a relative term which renders the claims indefinite. Although the specification provides a definition of the term, the definition does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. The specification defines "improved" sensory rating refers to an increased rating of one or more desired (or positive) sensory attributes or a decreased rating of one or more non-desired (or negative) sensory attributes (p. 3, ln. 18-23). Therefore, an improved sensory rating is a subjects rating of more or less of an attribute. More or less of an attribute does not clearly express the meaning of the claim phrase.

Furthermore, the claims fail to identify the difference between a desired or non-desired attribute. The desirability of an attribute is subjective. The specification does not provide a standard for ascertaining the requisite degree of desirability, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. The specification states, "it is known per se which range of the scale is the 'desired' range" and that this range "will vary according the food product tested" (p. 7, ln. 25-27). However, the claims fail to identify a desired or non-desired attribute. The specification fails to identify desirable versus non-desirable attributes. The specification fails to

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identify how to determine desirable versus undesirable characteristics. As a result, it is unclear how one can improve an unknown attribute.

Claim 1 is indefinite because the process lacks manipulative steps to achieve the desired intended use. First, the method states the starch breakdown is induced by salivary amylase. However, there is no recitation of contacting the food with salivary amylase. Therefore, it is unclear how to reduce a cause and effect relationship absent a cause, i.e. contacting with salivary amylase. Second, the method (and definition in the specification) state the rating is from a subject. However, the method fails to recite a subject, a subject consuming the food, and a subject rating the sensory perception. Therefore, it is unclear how one would improve a sensory rating absent any manipulative step for a subject to rate the sensory attributes.

The claims are indefinite because the meaning of semi-solid food product is unclear. The specification defines "Semi-solid food products" as products suitable for human or animal consumption, which are viscous, i.e. which are neither in a completely liquid nor in a completely solid form. The term semi-solid includes thus viscous liquids" (p. 2, ln. 28-30). The definition seems to exclude liquids ("neither in a completely liquid"), and also include liquids (ln. 30). The definition in the specification implies a difference between something that is not completely liquid and something that is viscous. However, the relative term "viscous" is not defined. The specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Although viscosity is a well known measure of resistance to fluid flow, the specification fails to provide

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viscosity that is considered viscous versus viscosity that is not considered viscous. The specification fails to provide examples of a semi-solid viscous liquid.

Claims 2 and 16 are indefinite because the meaning of low-fat is unclear. The specification defines "low-fat" as semi-solid food product in which the total fat content has been reduced compared to the standard normal-fat product, preferably so that the low-fat product has at least 30%, 40% or 50%, 80%, 90%, 95%, 99% or 100% less fat than the normal-fat product (specification, p. 2, ln. 31 to p. 3, ln. 8). The definition in the specification refers to a standard of normal fat product. However, there is not one standard fat in food products. The meaning of "normal" and "standard" change over time. Therefore, absent a defined standard a reduced amount cannot be determined.

Claims 3 and 19 are indefinite because the alternative limitations are unclear. Alternative expressions are permitted if they present no uncertainty or ambiguity with respect to the question of scope or clarity of the claims. MPEP 2173.05(h). In the present case, the alternative limitations are unclear and ambiguous. Claim recites the sensory rating is one or more of odor, mouthfeel, flavor or taste and afterfeel. It is unclear whether the group is 1) odor, mouthfeel, flavor or 2) taste and afterfeel; or any one of odor, mouthfeel, flavor, taste, and afterfeel.

Claims 3, 4, 5, 17, and 19 are indefinite because it is unclear how identifying particular sensory attributes limits the steps of the method and food product.

The following relative terms render the claimed indefinite: thickness (claims 4 and 17), creamy (claims 4 and 17), fatty (claims 4 and 17), afterfeel (claims 4 and 17), sliminess (claim 4), rough (claim 5), and heterogeneity (claim 5). Although the

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specification provides explanations of the terms. The definitions fail to provide an objective meaning. Furthermore, the terms themselves are based on subjective impressions of the attributes. See the following discussion for each recited sensory attribute:

The specification states: “‘thick’ or ‘thickness’ (ranging from thick to thin; the thickness sensation of the food in the mouth after it has been compressed through up- and down motions of the tongue against the palate)” (p. 4, ln. 12-13). Based on the specification thickness is between thick or thin. Since thickness encompasses anything from thin to thick, one of ordinary skill in the art cannot determine the scope of the recited improving a sensory perception of thickness. Furthermore, the description fails to identify a level of thickness to improve.

The specification states: “‘creamy’ (a range of sensations typically associated with fat content, such as full and sweet taste, compact, smooth, not rough, not dry, with a velvety (not oily) coating; food disintegrates at a moderate rate)” (p. 5, ln. 1-3). So, creamy means a range of sensations that are typically associated with fat content. However, this explanation does not allow one of ordinary skill in the art to determine the scope of the recited improving a sensory attribute of creamy. Furthermore, the description fails to identify a level of creamy to improve.

The specification states “afterfeel attributes” include creamy, sticky, fatty, astringent, and slime producing (p. 5, ln. 12-20). For the same reasoning discussed above, these explanations fail to allow one of ordinary skill in the art to determine the

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scope of the recited improving a sensory attribute of afterfeel. Furthermore, the description fails to identify a level of afterfeel to improve.

The specification states: "'slime producing' (food leaves a feeling of thick mucus in the mouth that is difficult to clear and swallow; typically caused by dairy products)" (p. 5, ln. 19-20). The specification does not explain the meaning of sliminess. The explanation of slime producing relies on a feeling of something that is difficult. The explanation fails to provide an objective standard to determine the difference between something that has a feeling of being difficult and something that has the feeling, but may not be difficult to swallow.

The specification states: "'fatty' (food leaves a fatty and oily layer on oral tissues, lubricating food transport in the mouth and stimulating saliva production)" (p. 5, ln. 4-5). This explanation describes what fatty does. However, the explanation fails to explain the scope of the meaning of an improved fatty sensory attribute. Furthermore, the description fails to identify a level of fatty to improve.

The specification states: "'rough' (roughness sensed on teeth, palate and tongue, typically caused by products 10 such as walnut, spinach, and wine)" (p. 5, ln. 9-10). The explanation fails to explain the scope of the meaning of an improved rough mouthfeel sensory attribute. Furthermore, the description fails to identify a level of rough mouthfeel to improve.

The specification states: "heterogeneous' or 'heterogeneity' (food is sensed simultaneously as thick and thin (or "cloudy" or "flocky") in the mouth while it is being mixed with saliva; various parts of the food seem to melt at different rates.)" (p. 4, ln. 25-

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27). However, the explanation fails to explain a food that is thick, thin, cloudy, and flocky in the mouth. Furthermore, the description fails to identify a level of heterogeneity attribute to improve.

Claim Rejections - 35 USC §102/103

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1-9, 11-14, and 16-19 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Haynes, USPN 6,013,299, as evidenced by Mann et al., USPA 2003/0049245.

Haynes discloses a semi-solid food product (dough, col. 11, ln. 24) comprising an enzyme resistant starch (col. 11, ln. 25). Haynes discloses the enzyme resistant starch is resistant to alpha amylase (col. 13, ln. 48), which is the enzyme in saliva (see Mann et al., p. 1, para 0003 disclosing saliva contains the enzyme ptyalin, which is an alpha-amylase).

While there is no disclosure that Haynes is “for improving the sensory rating of a semi-solid food product” as presently claimed, applicant’s attention is drawn to MPEP § 2112.02 which states that “when the claim recites using an old composition or structure and the ‘use’ is directed to a result or property of that composition or structure, then the claim is anticipated”. Furthermore, it has been held that a claim preamble directed to a result of mixing ingredients “is tantamount only to finding a property in the old composition.” MPEP 2112.02. In the present case, Haynes discloses a product having the disclosed and claimed composition. Therefore, the preamble language does not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition. In the alternative, the claim limitation would obviously have been provided by Haynes. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

Regarding claims 2 and 16, Haynes discloses low-fat (col. 25, ln. 66).

Regarding the amylase inhibitors in claims 6, 7, 11, and 12: Haynes discloses the composition includes monosaccharides (dextrose, fructose, col. 24, ln. 30; and galactose, col. 24, ln. 43). Haynes discloses the composition includes up to 3% (col. 26, ln. 66-67) monoglyceride (col. 26, ln. 51-52). Haynes discloses the composition includes a pH reducing agent (col. 26, ln. 37-38). Although Haynes does not explicitly teach the monosaccharides, monoglycerides, and pH reducing agents inhibit amylase, it is reasonable to presume that said limitations are present in both the present invention and Haynes. The specification discloses monosaccharides inhibit amylase (p. 9, ln. 4-

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5). The specification discloses monoglycerides more than 1% monoglyceride inhibits starch structure breakdown (specification, p. 10, ln. 10-13). The specification discloses pH reduction inhibits amylase (p. 10, ln. 20-23). Since, Haynes teaches the claimed and disclosed compositions, the burden is shifter to the Applicant to prove otherwise. MPEP 2112.

Regarding the particular sensory ratings in claims 3, 4, 5, 17, and 19: The claim limitations do not further limit or define manipulative steps in performing the method. The recitations further limit the intended use of the invention. As discussed above, Haynes discloses a product having the disclosed and claimed composition. Therefore, further limitations on the preamble language do not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition.

Regarding claims 8 and 13: Haynes discloses the starch is chemically modified (enzymatic debranching, col. 19, ln. 16).

Regarding claims 9 and 14: As discussed above, Haynes discloses various amylase inhibitors. The inhibitors are mixed with the starch in a dough composition. Therefore, the starch is coated with the inhibitors within the dough matrix.

Regarding claim 18, it is the examiner's position that dough could be consumed as a dessert.

7. Claims 1-9, 11-14, and 16-19 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Bengs et al., WO

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00/38537, as evidenced by Mann et al., USPA 2003/0049245. Note that Bengs et al, USPN 7,097,831 is being used as the English language equivalent of Bengs et al., WO 00/38537. The rejection below cites to the US patent document.

Bengs discloses a semi-solid food product (yogurt, milk, milk pudding etc., col. 8, ln. 30-35) comprising a starch (resistant starch, col. 1, ln. 5-6) that is resistant to breakdown by alpha amylase (col. 1, ln. 23-24), which is the enzyme in saliva (see Mann et al., p. 1, para 0003 disclosing saliva contains the enzyme ptyalin, which is an alpha-amylase).

While there is no disclosure that Bengs is “for improving the sensory rating of a semi-solid food product” as presently claimed, applicant’s attention is drawn to MPEP § 2112.02 which states that “when the claim recites using an old composition or structure and the ‘use’ is directed to a result or property of that composition or structure, then the claim is anticipated”. Furthermore, it has been held that a claim preamble directed to a result of mixing ingredients “is tantamount only to finding a property in the old composition.” MPEP 2112.02. In the present case, Bengs discloses a product having the disclosed and claimed composition. Therefore, the preamble language does not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition. In the alternative, the claim limitation would obviously have been provided by Bengs. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

Regarding the amylase inhibitors in claims 6, 7, 11, and 12: Bengs discloses the composition includes monosaccharides (fructose and glucose, col. 7, ln. 26-27). Bengs discloses the composition can include ascorbic acid (vitamin C, col. 5, ln. 63). Although Bengs does not explicitly teach the monosaccharides and ascorbic acid inhibit amylase, it is reasonable to presume that said limitations are present in both the present invention and Bengs. The specification discloses monosaccharides inhibit amylase (p. 9, ln. 4-5). The specification discloses a preferred pH reducer is ascorbic acid (p. 11, ln 2). Since, Bengs teaches the claimed and disclosed compositions, the burden is shifter to the Applicant to prove otherwise. MPEP 2112.

Regarding claims 2 and 16: Bengs discloses the starch is a fat substitute (col. 8, ln. 38). Furthermore, adding the starch to a food necessarily decreases the total percentage of fat in the food as a whole. In other words, simply adding the starch to a food results in a food that had X fat/Y amount of food to a food having X fat/(Y amount of food + starch). The specification defines low-fat as a food in which the total fat content has been reduced compared to the standard normal fat product (p. 3, ln. 1-2).

Regarding the particular sensory ratings in claims 3, 4, 5, 17, and 19: The claim limitations do not further limit or define manipulative steps in performing the method. The recitations further limit the intended use of the invention. As discussed above, Haynes discloses a product having the disclosed and claimed composition. Therefore, further limitations on the preamble language do not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the

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prior art composition. Furthermore, Bengs discloses the composition improves food properties (col. 8, ln. 48-49) like viscosity, mouthfeel, odor, and taste (col. 8, ln. 62-64).

Regarding claims 8 and 13, Bengs discloses chemically modified starch (col. 3, ln. 50).

Regarding claims 9 and 14: As discussed above, Bengs discloses various amylase inhibitors. The inhibitors are mixed with the starch in a food composition (col. 8, ln. 30-35). Therefore, the starch is coated with the inhibitors within the various food compositions.

Regarding claim 18, Bengs discloses yogurt, pudding, and spreads (col. 8, ln. 30-35), which can all be considered desserts and can be fed to a baby. Bengs discloses sauce (col. 8, ln. 33).

8. Claims 1, 3-7, 9-12, 14-15, and 17-18 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Eskritt et al., USPN 3,955,009.

Eskritt discloses a semi-solid food composition (yogurt, col. 1, ln. 10-11) having starch (col. 1, ln. 67-68) comprising an acidifying agent (citric acid, col. 2, ln. 26) that lowers the pH to 4 (col. 2, ln. 33-34).

Regarding the starch structure breakdown and amylase inhibitors in claims 1, 6, 7, 10, 11, 12, and 15: Eskritt discloses the composition includes monosaccharides (dextrose, col. 2, ln. 40). Eskritt discloses the composition can include an acidifying agent (citric acid, col. 2, ln. 26). Eskritt discloses pH of 4 (col. 2, ln. 33-34). Eskritt

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discloses the composition includes monoglyceride (col. 2, ln. 49) in an amount up to 3% (col. 2, ln. 7-8). Although Eskritt does not explicitly teach the monosaccharides and pH reducing agent inhibit amylase, it is reasonable to presume that said limitations are present in both the present invention and Eskritt. The specification discloses monosaccharides inhibit amylase (p. 9, ln. 4-5). The specification discloses a preferred pH reducer is citric acid (p. 11, ln 2). The specification discloses the pH is below 7 (p. 10, ln. 22). The specification discloses monoglycerides more than 1% monoglyceride inhibits starch structure breakdown (specification, p. 10, ln. 10-13). Since, Eskritt teaches the claimed and disclosed compositions, the burden is shifter to the Applicant to prove otherwise. MPEP 2112. In the alternative, the claim limitation would obviously have been provided by Eskritt. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

While there is no disclosure that Eskritt is “for improving the sensory rating of a semi-solid food product” as presently claimed, applicant’s attention is drawn to MPEP § 2112.02 which states that “when the claim recites using an old composition or structure and the ‘use’ is directed to a result or property of that composition or structure, then the claim is anticipated”. Furthermore, it has been held that a claim preamble directed to a result of mixing ingredients “is tantamount only to finding a property in the old composition.” MPEP 2112.02. In the present case, Eskritt discloses a product having the disclosed and claimed composition. Therefore, the preamble language does not

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patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition.

Regarding the particular sensory ratings in claims 3, 4, 5, and 17: The claim limitations do not further limit or define manipulative steps in performing the method. The recitations further limit the intended use of the invention. As discussed above, Eskritt discloses a product having the disclosed and claimed composition. Therefore, further limitations on the preamble language do not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition. Furthermore, Eskritt discloses the product has improved flavor (col. 1, ln. 64).

Regarding claims 9 and 14: As discussed above, Eskritt discloses various amylase inhibitors. The inhibitors are mixed with the starch in a food composition (col. 3, ln. 1-3). Therefore, the starch is coated with the inhibitors in the food compositions.

Regarding claim 18, Eskritt discloses a dessert (col. 1, ln. 10-11).

9. Claims 1-7, 10-12, and 15-19 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Pavey et al., USPN 3,969,534.

Pavey discloses a semi-solid food product (yogurt, buttermilk, spreads, col. 1, ln. 14-16) comprising starch (col. 3, ln. 6-7) and amylase inhibitor (pH less than 4.5 with citric acid, col. 5, ln. 1-3). Pavey discloses the product can be a low fat product (col. 1, ln. 5-6).

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Although Pavey does not explicitly teach the limitations reducing the starch breakdown induced by salivary amylase, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of the disclosed materials, i.e. pH reducing agent to reduce the pH to less than 7. On page 10, ln. 20-25, the specification discloses a pH-modifying (acidifying) compound is added to the semi-solid food products to reduce or inhibit amylase activity. Furthermore, the specification discloses the pH is lowered to less than 6.3 with citric acid (p. 11, ln. 1-2). The burden is upon the Applicant to prove otherwise. MPEP 2112. In the alternative, the claim limitation would obviously have been provided by Pavey. Note In re Best, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

While there is no disclosure that Pavey is “for improving the sensory rating of a semi-solid food product” as presently claimed, applicant’s attention is drawn to MPEP § 2112.02 which states that “when the claim recites using an old composition or structure and the ‘use’ is directed to a result or property of that composition or structure, then the claim is anticipated”. Furthermore, it has been held that a claim preamble directed to a result of mixing ingredients “is tantamount only to finding a property in the old composition.” MPEP 2112.02. In the present case, Pavey discloses a product having the disclosed and claimed composition. Therefore, the preamble language does not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition.

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Regarding the particular sensory ratings in claims 3, 4, 5, 17, and 19: The claim limitations do not further limit or define manipulative steps in performing the method. The recitations further limit the intended use of the invention. As discussed above, Pavey discloses a product having the disclosed and claimed composition. Therefore, further limitations on the preamble language do not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition. Furthermore, Pavey discloses the product has exceptional consistency in flavor, body, texture, and appearance (col. 3, ln. 54-56).

10. Claims 1, 3-7, 9, 11-12, 14, and 17-18 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Topping et al., USPN 6,245,326.

Regarding claims 1, 6, 9, 11, and 14: Topping discloses a semi-solid food (gel or solution of high viscosity, col. 5, ln. 61) comprising starch (col. 5, ln. 40) that is coated with matlodextrin (col. 16, ln. 30-32).

Regarding the starch structure breakdown and amylase inhibitors in claims 1, 6, 7, 11, and 12: Topping discloses the composition includes maltodextrin (col. 5, ln. 43). Topping discloses the composition includes the pH reducing agent citric acid (col. 16, ln. 17). Although Topping does not explicitly teach the maltodextrin inhibit amylase, it is reasonable to presume that said limitations are present in both the present invention and Topping. The specification discloses maltodextrin inhibits amylase (p. 9, ln. 24). The specification discloses a preferred pH reducer is citric acid (p. 11, ln 2). Since,

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Topping teaches the claimed and disclosed compositions, the burden is shifted to the Applicant to prove otherwise. MPEP 2112. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

While there is no disclosure that Topping is “for improving the sensory rating of a semi-solid food product” as presently claimed, applicant’s attention is drawn to MPEP § 2112.02 which states that “when the claim recites using an old composition or structure and the ‘use’ is directed to a result or property of that composition or structure, then the claim is anticipated”. Furthermore, it has been held that a claim preamble directed to a result of mixing ingredients “is tantamount only to finding a property in the old composition.” MPEP 2112.02. In the present case, Topping discloses a product having the disclosed and claimed composition. Therefore, the preamble language does not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition.

Regarding the particular sensory ratings in claims 3, 4, 5, and 17: The claim limitations do not further limit or define manipulative steps in performing the method. The recitations further limit the intended use of the invention. As discussed above, Topping discloses a product having the disclosed and claimed composition. Therefore, further limitations on the preamble language do not patentably distinguish the claimed invention from the prior art because the sensory rating properties are present in the prior art composition.

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Regarding claim 18, Topping discloses the product is has high viscosity (col. 5, ln. 61), which reads on a sauce, dressing, and soup. Furthermore, the product could be eaten as a dessert. In other words, the terms sauce, dressing, soup, and dessert do not distinguish the claimed invention from the prior art because they fail to describe structural or compositional limitations.

Conclusion

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to WALTER MOORE whose telephone number is (571) 270-7372. The examiner can normally be reached on Monday-Thursday 9:00-4:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Humera Sheikh can be reached on (571) 272-0604. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/WM/ Walter Moore
Examiner AU 1789

/C. SAYALA/
Primary Examiner, Art Unit 1781